Today's Chapter 13: Most recent case law regarding "projected disposable income" and latest issues concerning feasible chapter 13 plans

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TOPIC: Do the new mortgage notice and cure statutes enacted in Massachusetts provide a defense to a secured creditor's Motion For Relief in a chapter 13?

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I. BACKGROUND

A. **Colorable Claim/Standing**

Federal Rule of Civil Procedure 17(a), made applicable in bankruptcy by Federal Rule of Bankruptcy Procedure 7017 requires that an action must be prosecuted in the name of the real party in interest. As the Court noted in *Grella v. Salem Five Cent Saving Bank*, 42 F.3rd 26, 30 (1st Cir.1994):

> The question of the validity and perfection of a security interest which is the subject of a request for relief from stay goes to the heart of the issues before the court [during a relief from stay hearing]. If the security interest were invalid or unperfected, there would be no cause for relief from stay and the request would be denied.

For the moving party to prevail at the hearing on the Motion for Relief from Stay, the moving party must demonstrate a colorable claim to the property. See, in general:

1. In Re Schwartz, 366 BR 265 (Bankr.D.Mass.2007)
2. In Re Maisel, 378 B.R. 19 (Bankr.D.Mass 2007)
3. In Re Hayes, 292 B.R.259 (Bankr.D.Mass 2008.)

B. **Strict Compliance with Procedural Prerequisites**

It has long been held in Massachusetts, that the lender seeking to foreclosure the mortgagor's right of redemption must strictly comply with the dictates of the foreclosure statutes. See, in general

1. Moore v. Dick, 187 Mass. 207, 211-212, 72 N.E. 967 (1905), where the court, in setting aside a foreclosure sale on account of defective notice, stated: "It is familiar law that one who sells under a power (of sale) must follow strictly its terms. If he fails to do so there is no valid execution of the power and the sale is wholly void
2. McGreevey v. Charlestown Five Cents Sav. Bank, 294 Mass. 480, 483-484, 2 N.E.2d 543 (1936) The manner in which the notice of the proposed sale shall be given is one of the important terms of the power and a strict compliance with it is essential to the valid exercise of the power.".

3. Tamburello v. Monahan, 321 Mass. 445, 447, 73 N.E.2d 734 (1947).

II. STATE STATUTES

A. **Notice: Strict compliance with notice requirements.** Failure of lender to strictly comply with procedural pre-requisites to foreclose, may give the debtor a defense sufficient to ask the Court to defer or modify or condition the requested relief. Has the moving party given the proper notice of his/her "right to cure"

1. **244 § 35A. Right to cure default**. Recently amended to extend right to cure from 90 days to 150 days but with many "provisos" and traps. See Exhibits appended hereto.

2. **Practice Hint**: pursuant to G.L. c. 244 § 14A, the Division of Banks is to maintain a foreclosure database. www.mass.gov/dob In an active foreclosure, the lender must submit proof that it has given the proper 90/150 day right to cure in the form of an affidavit. Query: whether or not the debtor can access that affidavit through expedited discovery which should be available through Federal Rule of Bankruptcy Procedure 9014 which incorporates the adversary proceeding discovery rules.

B. **Assignment:** Raise the standing issue if applicable. Is the entity bringing the action authorized to do so.

1. **Timing**: See, for instance:
   a. U.S. Bank, N.A. v. Ibanez Nos 384283 (KCL), 38601(KCL), 386755(KCL), 2009 WL 795201 (Mass. Land Ct. Mar 26 2009), motion to vacate denied, 2009 WL 3297551 (Mass. Land Ct. Oct 14 2009). The Land Court asserted that only a recordable assignment of mortgage, *executed prior to publication of the foreclosure notice*, gave the foreclosing entity authority to foreclose.
   b. In Re Maisel, Judge Rosenthal made note that as the Movant (the servicer of the mortgage) was an unrelated third party that has no interest in the mortgage or note until **after** the Motion for Relief was filed, the Movant did not have standing to seek relief from stay.

2. **Authority to grant an assignment**: Pursuant to G.L c 183 § 54B, assignments may only be executed by certain officers of the person holding record title. An assignment by an "Authorized Signatory" without more, may not meet that burden. See text of G.L.ch 183 § 54B appended hereto as an exhibit.

3. **Practice Hint**: Debtor's counsel should do a title rundown to examine the details of each and every recorded assignment.

C. **260 § 33** Obsolete Mortgages. See text appended hereto.

1. In Re Motta, 434 B.R. 193 (Bankr.D.Mass 2010);
2. In Re Shamus Holdings, 409 B.R. 598 (Bankr.D.Mass. 2009)

G.L. c. 244 § 35A

The Official Website of the Office of Consumer Affairs & Business Regulation (OCABR)

Mass.Gov

Consumer Affairs and Business Regulation

Summary of An Act Relative to Mortgage Foreclosures (Chapter 258 of the Acts of 2010)

On August 7, 2010, Governor Patrick signed Chapter 258 of the Acts of 2010, An Act Relative to Mortgage Foreclosures ("Chapter 258" or "the Act") into law. Provisions of this legislation include:

150-Day Right To Cure After Default on Mortgage Loans: The Act extends the 90 day right to cure a default on a residential mortgage loan to 150 days unless the lender certified that it has engaged in a good faith effort to resolve the issue of the amounts due with the homeowner and the effort has included at least one meeting with the homeowner, the homeowner's attorney or the homeowner's representative. If, after that meeting, the parties cannot work out a resolution, the lender could begin foreclosure proceedings after a right to cure period of 90 days. Further, a borrower who fails to respond within 30 days of a mailed communication offering to negotiate a commercially reasonable alternative will be deemed to have forfeited the 150-day right to cure and will have a 90-day right to cure instead. The borrower can confirm response by confirmation of a fax to the creditor; proof of delivery by the postal service or similar carrier; or a record of a telephone call to the creditor captured on a telephone bill or pin register. The right to cure a default "shall be granted" only once during any 3 year period.

The 150 day right to cure provision expires on January 1, 2016, at which point the period reverts back to 90 days.

Reverse Mortgages: The Act prohibits a mortgagee from making a reverse mortgage unless the mortgagor affirmatively opts in writing, at or before the closing, for the reverse mortgage. Effective August 1, 2012, the Act will also require, prior to obtaining a reverse mortgage, certification of in-person counseling relative to the appropriateness of a reverse mortgage transaction from a counselor with a third party organization that has been approved by the Executive Office of Elder Affairs.

Tenant Protections in Foreclosed Properties: The new law establishes protections for tenants in foreclosed properties. For more information, please click here.

Rental Subsidy Under a Lease After Foreclosure: Chapter 206 of the Acts of 2007 established that the lease for a tenant whose rental payment is subsidized under state or federal law shall not be affected by a foreclosure sale. Chapter 258 clarifies that a foreclosing entity shall assume the lease and rental subsidy contract with the rent subsidiary administrator after foreclosure.

Mortgage Fraud: Chapter 258 establishes the crime of mortgage fraud in the Commonwealth for any person making material misstatements or material omissions knowing such statements or omissions to be false during the mortgage lending process with the intent that such statements be relied on by the mortgage lender, borrower or any other party in the mortgage lending process.

Tax Credit: The Act establishes a property tax exemption for real estate acquired through foreclosure and owned or held in trust by a charitable organization for creating community housing. The tax exemption does not extend beyond 7 years. This is a local option that would have to be adopted by each city or town.

For more information on Chapter 258, please click here.

Chapter 258 can be reviewed for other changes and effective dates.

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PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES
(Chapters 211 through 262)

TITLE III REMEDIES RELATING TO REAL PROPERTY

CHAPTER 244 FORECLOSURE AND REDEMPTION OF MORTGAGES

Section 35A Right of residential real property mortgagor to cure a default; acceleration of maturity date; notice; fees and penalties associated with default; filing of notice

[Text of section effective until August 7, 2010 applicable as provided by 2007, 206, Sec. 21 as amended by 2007, 224, Sec. 2. For text effective August 7, 2010, see below.]

Section 35A. (a) Any mortgagor of residential real property located in the commonwealth consisting of a dwelling house with accommodations for 4 or less separate households and occupied in whole or in part by the mortgagor, shall have a 90 day right to cure a default of a required payment as provided in such residential mortgage or note secured by such residential real property by full payment of all amounts that are due without acceleration of the maturity of the unpaid balance of such mortgage. The right to cure a default of a required payment shall be granted once during any 5 year period, regardless of the mortgage holder.

(b) The mortgagee, or anyone holding thereunder, shall not accelerate maturity of the unpaid balance of such mortgage obligation or otherwise enforce the mortgage because of a default consisting of the mortgagor's failure to make any such payment in subsection (a) by any method authorized by this chapter or any other law until at least 90 days after the date a written notice is given by the mortgagee to the mortgagor.

Said notice shall be deemed to be delivered to the mortgagor when delivered to the mortgagor or when mailed to the mortgagor at the mortgagor's address last known to the mortgagee or anyone holding thereunder.

(c) The notice required in subsection (b) shall inform the mortgagor of the following:--

(1) the nature of the default claimed on such mortgage of residential real property and of the mortgagor's right to cure the default by paying the sum of money required to cure the default;

(2) the date by which the mortgagor shall cure the default to avoid acceleration, a foreclosure or other action to seize the home, which date shall not be less than 90 days after service of the notice and the name, address and local or toll free telephone number of a person to whom the payment or tender shall be made;

(3) that, if the mortgagor does not cure the default by the date specified, the mortgagee, or anyone holding thereunder, may take steps to terminate the mortgagor's ownership in the property by a foreclosure proceeding or other action to seize the home;

(4) the name and address of the mortgagee, or anyone holding thereunder, and the telephone number of a representative of the mortgagee whom the mortgagor may contact if the mortgagor disagrees with the mortgagee's assertion that a default has occurred or the correctness of the mortgagee's calculation of the amount required to cure the default;

(5) the name of any current and former mortgage broker or mortgage loan originator for such mortgage or note securing the residential property; and

(6) that the mortgagor may be eligible for assistance from the Massachusetts Housing Finance Agency and the division of banks and the local or toll free telephone numbers the mortgagor may call to request this assistance.

(d) To cure a default prior to acceleration under this section, a mortgagor shall not be required to pay any charge, fee, or penalty attributable to the exercise of the right to cure a default. The mortgagor shall pay late fees as allowed pursuant to section 59 of chapter 183 and per-diem interest to cure such default. The mortgagor shall not be liable for any attorneys' fees relating to the mortgagor's default that are incurred by the mortgagee or anyone holding thereunder prior to or during the period set forth in the notice required by this section. The mortgagee, or anyone holding thereunder, may also provide for reinstatement of the note after the 90 day notice to cure has ended.

(e) A copy of the notice required by this section and an affidavit demonstrating compliance with this section shall be filed by the mortgagee, or anyone holding thereunder, in any action or proceeding to foreclose on such residential real property.

(f) A copy of the notice required by this section shall also be filed by the mortgagee, or anyone holding thereunder, with the commissioner of the division of banks. Additionally, if the residential property securing the mortgage loan is sold at a foreclosure sale, the mortgagee, or anyone holding thereunder, shall notify the commissioner of the division of banks, in writing, of the date of the foreclosure sale and the purchase price obtained at the sale.

Chapter 244: Section 35A. Right of residential real property mortgagor to cure a default; good faith effort to negotiate for commercially reasonable alternative to foreclosure; response from borrower; affidavit upon initiation of foreclosure proceedings; acceleration of maturity of balance prohibited; notice

[Text of section as amended by 2010, 258, Sec. 7 effective August 7, 2010 until January 1, 2016. For text effective until August 7, 2010, see above. For text effective January 1, 2016, see below.]

Section 35A. (a) As used in this section, the following words shall, unless the context clearly requires otherwise, have the following meanings:

"Borrower", a mortgagor of a mortgage loan.

"Borrower's representative", an employee or contractor of a non-profit organization certified by Housing and Urban Development, an employee or contractor of a foreclosure education center pursuant to section 16 of chapter 206 of the acts of 2007 or an employee or contractor of a counseling agency receiving a Collaborative Seal of Approval from the Massachusetts Homeownership Collaborative administered by the Citizens' Housing and Planning Association.

"Creditor", a person or entity that holds or controls, partially, wholly, indirectly, directly, or in a nominee capacity, a mortgage loan securing a residential property, including, without limitation, an originator, holder, investor, assignee, successor, trust, trustee, nominee holder, Mortgage Electronic Registration System or mortgage servicer, including the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation. "Creditor" shall also include any servant, employee or agent of a creditor.

"Creditor's representative", a person who has the authority to negotiate the terms of and modify a mortgage loan.

"Modified mortgage loan", a mortgage modified from its original terms including, but not limited to, a loan modified pursuant to 1 of the following: (i) the Home Affordable Modification Program; (ii) the Federal Deposit Insurance Corporation's Loan Modification Program; (iii) any modification program that a lender uses which is based on accepted principles and the safety and soundness of the institution and recognized by the National Credit Union Administration, the Division of Banks or any other instrumentality of the commonwealth; (iv) the Federal Housing Agency; or (v) a similar federal refinance plan.

"Mortgage loan", a loan to a natural person made primarily for personal, family or household purposes secured wholly or partially by a mortgage on residential property.

"Net present value", the present net value of a residential property based on a calculation using 1 of the following:

(i) the federal Home Affordable Modification Program Base Net Present Value Model, (ii) the Federal Deposit Insurance Corporation's Loan Modification Program; or (iii) for the Massachusetts Housing Finance Agency's loan program used solely by the agency to compare the expected economic outcome of a loan with or without a loan modification.

"Residential property", real property located in the commonwealth having thereon a dwelling house with accommodations for 4 or less separate households and occupied, or to be occupied, in whole or in part by the obligor on the mortgage debt; provided, however, that residential property shall be limited to the principal residence of a person; provided further, that residential property shall not include an investment property or residence other than a primary residence; and provided further, that residential property shall not include residential property taken in whole or in part as collateral for a commercial loan.

(b) A mortgagor of residential property shall have a 150-day right to cure a default of a required payment as provided in the residential mortgage or note secured by the residential property by full payment of all amounts that are due without acceleration of the maturity of the unpaid balance of the mortgage; provided, however, that if a creditor certifies that: (i) it has engaged in a good faith effort to negotiate a commercially reasonable alternative to foreclosure as described in subsection (c); (ii) its good faith effort has involved at least 1 meeting, either in person or by telephone, between a creditor's representative and the borrower, the borrower's attorney or the borrower's representative; and (iii) after such meeting the borrower and the creditor were not successful in resolving their dispute, then the creditor may begin foreclosure proceedings after a right to cure period lasting 90 days. A borrower who fails to respond within 30 days to any mailed communications offering to negotiate a commercially reasonable alternative to foreclosure sent via certified and first class mail or similar service by a private carrier from the lender shall be deemed to have forfeited the right to a 150-day right to cure period and shall be subject to a right to cure period lasting 90 days. The right to cure a default of a required payment shall be granted once during any 3 year period, regardless of mortgage holder.

(c) For purposes of this section, a determination that a creditor has made a good faith effort to negotiate and agree upon a commercially reasonable alternative to foreclosure shall mean that the creditor has considered: (i) an assessment of the borrower's current circumstances including, without limitation, the borrower's current income, debts and obligations; (ii) the net present value of receiving payments pursuant to a modified mortgage loan as compared to the anticipated net recovery following foreclosure; and (iii) the interests of the creditor; provided, however, that nothing in this subsection shall be construed as prohibiting a creditor from considering other factors; provided, further, that the creditor shall provide by first class and certified mail or similar service by a private carrier to a borrower documentation of good faith effort 10 days prior to meeting, telephone conversation or a meeting pursuant to subsection (b).

(d) A borrower who receives a loan modification offer from the creditor resulting from the lender's good faith effort to negotiate and agree upon a commercially reasonable alternative to foreclosure shall respond within 30 days of receipt of first class or certified mail. A borrower shall be presumed to have responded if the borrower provides: (i) confirmation of a facsimile transmission to the creditor; (ii) proof of delivery through the United States Postal Service or similar carrier; or (iii) record of telephone call to the creditor captured on a telephone bill or pin register. A borrower who fails to respond to the creditor's offer within 30 days of receipt of a loan modification offer shall be deemed to have forfeited the 150-day right to cure period and shall be subject to a right to cure period lasting 90 days.

(e) Nothing in this section shall prevent a creditor from offering or accepting alternatives to foreclosure, such as a short sale or deed-in-lieu of foreclosure, if the borrower requests such alternatives, rejects a loan modification offered pursuant to this subsection or does not qualify for a loan modification pursuant to this subsection.

(f) A creditor that chooses to begin foreclosure proceedings after a right to cure period lasting less than 150 days that engaged in a good faith effort to negotiate and agree upon a commercially reasonable alternative but was not successful in resolving the dispute shall certify compliance with this section in an affidavit. The affidavit shall include the time and place of the meeting, parties participating, relief offered to the borrower, a summary of the creditor's net present value analysis and applicable inputs of the analysis and certification that any modification or option offered complies with current federal law or policy. A creditor shall provide a copy of the affidavit to the homeowner and file a copy of the affidavit with the land court in advance of the foreclosure.

General Laws: CHAPTER 244, Section 35A

(g) The mortgagee, or anyone holding thereunder, shall not accelerate maturity of the unpaid balance of such mortgage obligation or otherwise enforce the mortgage because of a default consisting of the mortgagor's failure to make any such payment in subsection (b) by any method authorized by this chapter or any other law until at least 150 days after the date a written notice is given by the mortgagee to the mortgagor; provided, however, that a creditor meeting the requirements of subsection (b) that chooses to begin foreclosure proceedings after a right to cure period lasting less than 150 days may accelerate maturity of the unpaid balance of such mortgage obligation or otherwise enforce the mortgage because of a default consisting of the mortgagor's failure to make any such payment in subsection (b) by any method authorized by this chapter or any other law not less than 91 days after the date a written notice is given by the creditor to the mortgagor.

Said notice shall be deemed to be delivered to the mortgagor: (i) when delivered by hand to the mortgagor; or (ii) when sent by first class mail and certified mail or similar service by a private carrier to the mortgagor at the mortgagor's address last known to the mortgagee or anyone holding thereunder.

(h) The notice required in subsection (g) shall inform the mortgagor of the following:--

(1) the nature of the default claimed on such mortgage of residential real property and of the mortgagor's right to cure the default by paying the sum of money required to cure the default;

(2) the date by which the mortgagor shall cure the default to avoid acceleration, a foreclosure or other action to seize the home, which date shall not be less than 150 days after service of the notice and the name, address and local or toll free telephone number of a person to whom the payment or tender shall be made unless a creditor chooses to begin foreclosure proceedings after a right to cure period lasting less than 150 days that engaged in a good faith effort to negotiate and agree upon a commercially reasonable alternative but was not successful in resolving the dispute, in which case a foreclosure or other action to seize the home may take place on an earlier date to be specified;

(3) that, if the mortgagor does not cure the default by the date specified, the mortgagee, or anyone holding thereunder, may take steps to terminate the mortgagor's ownership in the property by a foreclosure proceeding or other action to seize the home;

(4) the name and address of the mortgagee, or anyone holding thereunder, and the telephone number of a representative of the mortgagee whom the mortgagor may contact if the mortgagor disagrees with the mortgagee's assertion that a default has occurred or the correctness of the mortgagee's calculation of the amount required to cure the default;

(5) the name of any current and former mortgage broker or mortgage loan originator for such mortgage or note securing the residential property;

(6) that the mortgagor may be eligible for assistance from the Homeownership Preservation Foundation or other foreclosure counseling agency, and the local or toll free telephone numbers the mortgagor may call to request this assistance;

(7) that the mortgagor may sell the property prior to the foreclosure sale and use the proceeds to pay off the mortgage;

(8) that the mortgagor may redeem the property by paying the total amount due, prior to the foreclosure sale;

(9) that the mortgagor may be evicted from the home after a foreclosure sale; and

(10) the mortgagor may have the following additional rights, depending on the terms of the residential mortgage: (i) to refinance the obligation by obtaining a loan which would fully repay the residential mortgage debtor; and (ii) to

voluntarily grant a deed to the residential mortgage lender in lieu of foreclosure.

The notice shall also include a declaration, in the language the creditor has regularly used in its communication with the borrower, appearing on the first page of the notice stating: "This is an important notice concerning your right to live in your home. Have it translated at once."

The division of banks shall adopt regulations in accordance with this subsection.

(i) To cure a default prior to acceleration under this section, a mortgagor shall not be required to pay any charge, fee or penalty attributable to the exercise of the right to cure a default. The mortgagor shall pay late fees as allowed pursuant to section 59 of chapter 183 and per-diem interest to cure such default. The mortgagor shall not be liable for any attorneys' fees relating to the mortgagor's default that are incurred by the mortgagee or anyone holding thereunder prior to or during the period set forth in the notice required by this section. The mortgagee, or anyone holding thereunder, may also provide for reinstatement of the note after the 150-day notice to cure has ended.

(j) A copy of the notice required by this section and an affidavit demonstrating compliance with this section shall be filed by the mortgagee, or anyone holding thereunder, in any action or proceeding to foreclose on such residential real property.

(k) A copy of the notice required by this section shall also be filed by the mortgagee, or anyone holding thereunder, with the commissioner of the division of banks. Additionally, if the residential property securing the mortgage loan is sold at a foreclosure sale, the mortgagee, or anyone holding thereunder, shall notify the commissioner of the division of banks, in writing, of the date of the foreclosure sale and the purchase price obtained at the sale.

Chapter 244: Section 35A. Right of residential real property mortgagor to cure a default; notice required to accelerate maturity of balance; contents of notice; late fees; filing

[Text of section as amended by 2010, 258, Sec. 8 effective January 1, 2016. See 2010, 258, Sec. 14. For text effective until January 1, 2016, see above.]

Section 35A. (a) Any mortgagor of residential real property located in the commonwealth, shall have a 90-day right to cure a default of a required payment as provided in such residential mortgage or note secured by such residential real property by full payment of all amounts that are due without acceleration of the maturity of the unpaid balance of such mortgage. The right to cure a default of a required payment shall be granted once during any 5-year period, regardless of the mortgage holder. For the purposes of this section, "residential property", shall mean real property located in the commonwealth having thereon a dwelling house with accommodations for 4 or less separate households and occupied, or to be occupied, in whole or in part by the mortgagor; provided, however, that residential property shall be limited to the principal residence of a person; provided further, that residential property shall not include an investment property or residence other than a primary residence; and provided further, that residential property shall not include residential property taken in whole or in part as collateral for a commercial loan.

(b) The mortgagee, or anyone holding thereunder, shall not accelerate maturity of the unpaid balance of such mortgage obligation or otherwise enforce the mortgage because of a default consisting of the mortgagor's failure to make any such payment in subsection (a) by any method authorized by this chapter or any other law until at least 90 days after the date a written notice is given by the mortgagee to the mortgagor.

Said notice shall be deemed to be delivered to the mortgagor: (i) when delivered by hand to the mortgagor; or (ii) when sent by first class mail and certified mail or similar service by a private carrier to the mortgagor at the mortgagor's address last known to the mortgagee or anyone holding thereunder.

(c) The notice required in subsection (b) shall inform the mortgagor of the following:--

(1) the nature of the default claimed on such mortgage of residential real property and of the mortgagor's right to

General Laws: CHAPTER 244, Section 35A

cure the default by paying the sum of money required to cure the default;

(2) the date by which the mortgagor shall cure the default to avoid acceleration, a foreclosure or other action to seize the home, which date shall not be less than 90 days after service of the notice and the name, address and local or toll free telephone number of a person to whom the payment or tender shall be made;

(3) that, if the mortgagor does not cure the default by the date specified, the mortgagee, or anyone holding thereunder, may take steps to terminate the mortgagor's ownership in the property by a foreclosure proceeding or other action to seize the home;

(4) the name and address of the mortgagee, or anyone holding thereunder, and the telephone number of a representative of the mortgagee whom the mortgagor may contact if the mortgagor disagrees with the mortgagee's assertion that a default has occurred or the correctness of the mortgagee's calculation of the amount required to cure the default;

(5) the name of any current and former mortgage broker or mortgage loan originator for such mortgage or note securing the residential property;

(6) that the mortgagor may be eligible for assistance from the Massachusetts Housing Finance Agency and the division of banks and the local or toll free telephone numbers the mortgagor may call to request this assistance;

(7) that the mortgagor may sell the property prior to the foreclosure sale and use the proceeds to pay off the mortgage;

(8) that the mortgagor may redeem the property by paying the total amount due, prior to the foreclosure sale;

(9) that the mortgagor may be evicted from the home after a foreclosure sale; and

(10) the mortgagor may have the following additional rights, depending on the terms of the residential mortgage: (i) to refinance the obligation by obtaining a loan which would fully repay the residential mortgage debtor; and (ii) to voluntarily grant a deed to the residential mortgage lender in lieu of foreclosure.

The notice shall also include a declaration, appearing on the first page of the notice stating: "This is an important notice concerning your right to live in your home. Have it translated at once."

The division of banks shall adopt regulations in accordance with this subsection.

(d) To cure a default prior to acceleration under this section, a mortgagor shall not be required to pay any charge, fee, or penalty attributable to the exercise of the right to cure a default. The mortgagor shall pay late fees as allowed pursuant to section 59 of chapter 183 and per-diem interest to cure such default. The mortgagor shall not be liable for any attorneys' fees relating to the mortgagor's default that are incurred by the mortgagee or anyone holding thereunder prior to or during the period set forth in the notice required by this section. The mortgagee, or anyone holding thereunder, may also provide for reinstatement of the note after the 90 day notice to cure has ended.

(e) A copy of the notice required by this section and an affidavit demonstrating compliance with this section shall be filed by the mortgagee, or anyone holding thereunder, in any action or proceeding to foreclose on such residential real property.

(f) A copy of the notice required by this section shall also be filed by the mortgagee, or anyone holding thereunder, with the commissioner of the division of banks. Additionally, if the residential property securing the mortgage loan is sold at a foreclosure sale, the mortgagee, or anyone holding thereunder, shall notify the commissioner of the division of banks, in writing, of the date of the foreclosure sale and the purchase price obtained at the sale.

Division of Banks

Consumer Affairs and Business Regulation

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January 25, 2010 - For immediate release:

Office of Consumer Affairs Announces Launch of NMLS Consumer Access to Mortgage Lender Information

Searchable On-Line Database to Provide Detailed Information on All Licensed Mortgage Lenders, Mortgage Brokers, and Loan Originators in Country

BOSTON – January 25, 2010 – The Patrick-Murray Administration's Office of Consumer Affairs and Business Regulation today announced that the Nationwide Mortgage Licensing System & Registry, a mortgage licensing system operated by state financial regulators including the Massachusetts Division of Banks, is launching "NMLS Consumer Access."

NMLS Consumer Access is a fully searchable website that allows the public to view information concerning state-licensed mortgage lenders, brokers and individuals currently licensed through NMLS. Future updates to NMLS Consumer Access will provide a record of applicable disciplinary actions taken against a licensee by any jurisdiction in the country.

"The goal of NMLS Consumer Access is to increase transparency in the mortgage process by providing homebuyers and the general public with direct access to information regarding state licensed companies and professionals in the mortgage industry," said Barbara Anthony, the Undersecretary of the Office of Consumer Affairs and Business Regulation. "States have always been at the forefront in protecting consumers. I am certain that NMLS Consumer Access will quickly become an invaluable tool for consumers to research prospective mortgage companies and providers."

The NMLS is a universal licensing portal designed to streamline the licensing process for both regulatory agencies and the mortgage industry by providing a centralized and standardized system for mortgage licensing. The NMLS initiative was begun by state mortgage regulators in 2004 in response to the increased volume and variety of residential mortgage originators and the need to address these changes with modern systems and authorities.

"Creating a 21st Century model for state supervision of the non-bank mortgage lending industry has long been a top priority of state regulators. The foundation for this 21st Century system of coordinated state supervision is the NMLS," said Commissioner of Banks Steven L. Antonakes.

The Division has been at the forefront in the development of the NMLS. Antonakes has served as a founding member of the NMLS oversight board for over three years, participating in weekly conference calls to supervise the implementation of the NMLS. In January 2008, the Division and six other state mortgage regulators became the first states in the country to manage their mortgage brokers, mortgage lenders and loan originators exclusively through the NMLS. Currently, 45 states and territories license mortgage companies, branches and individuals through the system. All 54 states and territories are expected to be participating in NMLS by the end of 2010.

In July 2010, the Federal Housing Finance Agency will mandate that Fannie Mae and Freddie Mac accept mortgage products only from mortgage companies who are registered through the NMLS. Accordingly, NMLS has created the ability to associate the loan documents and business practices with the individual and company that negotiated the transaction by registering every loan originator with a unique identifier and requiring that identifier to be incorporated with loan origination documents. Further, NMLS Consumer Access will be updated in the future to serve as a central repository for enforcement actions against companies and individuals.

Office of Consumer Affairs and Business Regulation - - Press Release

"NMLS will become an increasingly powerful tool to ensure that bad actors cannot hide from their past actions," Antonakes said. "When combined with the upcoming required registration of loan originators employed by banks and credit unions, we have created an almost seamless connection that begins with practices and products, and culminates with any record of consumer harm."

NMLS Consumer Access can be accessed here: www.nmlsconsumeraccess.org.

G.L. c. 183 § 54B

General Laws: CHAPTER 183, Section 54B

Print

PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS
(Chapters 183 through 210)

TITLE I TITLE TO REAL PROPERTY

CHAPTER 183 ALIENATION OF LAND

Section 54B Mortgage release, assignment, etc.; execution before officer entitled to acknowledge instruments; effect

[Text of section effective until November 7, 2010. For text effective November 7, 2010, see below.]

Section 54B. A deed of release or written acknowledgment of payment or satisfaction of the debt thereby secured, or a release, partial release or assignment of mortgage, or an instrument of subordination, non-disturbance, recognition, or attornment by the holder of a mortgage, or a power of attorney for the purpose of foreclosing a mortgage held by any such holder and executing any instrument necessary for that purpose, executed before a notary public, justice of the peace or other officer entitled by law to acknowledge instruments, whether executed within or without the commonwealth, by a person purporting to hold the position of president, vice president, treasurer, clerk, secretary, cashier, loan representative, principal, investment, mortgage or other officer, agent, asset manager, or other similar office or position, including assistant to any such office or position, of the entity holding record title thereto on behalf of such entity acting in its own capacity or as a general partner or co-venturer of the entity holding record title, shall be binding upon such entity and shall be entitled to be recorded or filed, and no vote of the entity affirming such authority shall be required to permit recording of filing.

Chapter 183: Section 54B. Mortgage discharge, release, assignment, foreclosure, etc.; execution before officer entitled to acknowledge instruments; effect

[Text of section as amended by 2010, 282, Sec. 2 effective November 7, 2010 applicable as provided by 2010, 282, Sec. 7. For text effective until November 7, 2010, see above.]

Section 54B. Notwithstanding any law to the contrary, (1) a discharge of mortgage; (2) a release, partial release or assignment of mortgage; (3) an instrument of subordination, non-disturbance, recognition, or attornment by the holder of a mortgage; (4) any instrument for the purpose of foreclosing a mortgage and conveying the title resulting therefrom, including but not limited to notices, deeds, affidavits, certificates, votes, assignments of bids, confirmatory instruments and agreements of sale; or (5) a power of attorney given for that purpose or for the purpose of servicing a mortgage, and in either case, any instrument executed by the attorney-in-fact pursuant to such power, if executed before a notary public, justice of the peace or other officer entitled by law to acknowledge instruments, whether executed within or without the commonwealth, by a person purporting to hold the position of president, vice president, treasurer, clerk, secretary, cashier, loan representative, principal, investment, mortgage or other officer, agent, asset manager, or other similar office or position, including assistant to any such office or position, of the entity holding such mortgage, or otherwise purporting to be an authorized signatory for such entity, or acting under such power of attorney on behalf of such entity, acting in its own capacity or as a general partner or co-venturer of the entity holding such mortgage, shall be binding upon such entity and shall be entitled to be recorded, and no vote of the entity affirming such authority shall be required to permit recording.

G.L. c 260 § 33

General Laws: CHAPTER 260, Section 33

Print

PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES
(Chapters 211 through 262)

TITLE V STATUTES OF FRAUDS AND LIMITATIONS

CHAPTER 260 LIMITATION OF ACTIONS

Section 33 Obsolete mortgages

Section 33. A power of sale in any mortgage of real estate shall not be exercised and an entry shall not be made nor possession taken nor proceeding begun for foreclosure of any such mortgage after the expiration of, in the case of a mortgage in which no term of the mortgage is stated, 35 years from the recording of the mortgage or, in the case of a mortgage in which the term or maturity date of the mortgage is stated, 5 years from the expiration of the term or from the maturity date, unless an extension of the mortgage, or an acknowledgment or affidavit that the mortgage is not satisfied, is recorded before the expiration of such period. In case an extension of the mortgage or the acknowledgment or affidavit is so recorded, the period shall continue until 5 years shall have elapsed during which there is not recorded any further extension of the mortgage or acknowledgment or affidavit that the mortgage is not satisfied. The period shall not be extended by reason of non-residence or disability of any person interested in the mortgage or the real estate, or by any partial payment, agreement, extension, acknowledgment, affidavit or other action not meeting the requirements of this section and sections 34 and 35. Upon the expiration of the period provided herein, the mortgage shall be considered discharged for all purposes without the necessity of further action by the owner of the equity of redemption or any other persons having an interest in the mortgaged property and, in the case of registered land, upon the payment of the fee for the recording of a discharge, the mortgage shall be marked as discharged on the relevant memorandum of encumbrances in the same manner as for any other mortgage duly discharged.

Other

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January 02, 2008 - For immediate release:

Massachusetts Joins Launch of Nationwide Mortgage Licensing System

Combined with new comprehensive mortgage law, system promises to enhance state's ability to supervise industry and protect consumers

BOSTON - Wednesday, January 2, 2008 -The Patrick Administration announced today that the Massachusetts Division of Banks has joined six other state mortgage regulators as the first agencies in the country to participate in the Nationwide Mortgage Licensing System (NMLS). The new system, four years in the making, became operational today and will increase and centralize information available to regulators, consumers and industry officials about the individuals and companies that originate and make home mortgages.

Massachusetts Commissioner of Banks Steve Antonakes, one of the five state regulators who serve as a founding board member charged with overseeing the NMLS, noted that Massachusetts has played a leading role in the system's development and implementation. Antonakes credited Governor Patrick and Senator Stephen J. Buoniconti and Representative Ronald Mariano, the chairmen of the Joint Committee on Financial Services, for recognizing the significance of the new licensing system.

"The NMLS represents a new era in the supervision of the mortgage industry that promises to promote more stable markets and better protect consumers," said Antonakes. "The combination of the tools and resources available to the Division through the state's new comprehensive mortgage law and this licensing system has secured the Commonwealth's place at the forefront of mortgage regulatory reform."

Modeled after the registry used to regulate securities brokers and dealers, the NMLS will allow mortgage companies to apply for and manage their licenses electronically. Mortgage companies and professionals will maintain a single record, electronically stored in a secure database accessible by licensees over the Internet, which will provide consistent and comprehensive information to state regulators so they can better supervise the industry. Mortgage lenders, brokers and loan officers will be able to maintain a single record with which they can apply for, amend, update, renew or surrender licenses online in one or more states. Consumers are scheduled to have access to the system's public licensing and enforcement information beginning next year in order to help them make informed decisions when selecting mortgage loan officers and lenders.

"The Division of Banks licenses and supervises over 2,000 mortgage lenders and brokers. By moving to the NMLS, we will now be able to track lender activity both inside and outside of Massachusetts," said Antonakes. "We want to ensure that our licensees are playing by the rules in order to fight mortgage fraud and predatory lending and increase accountability within the industry so that borrowers are better protected. This new system gives us the framework and tools we need to get the job done."

As part of the Patrick Administration's ongoing response to the recent turmoil in the mortgage markets and the resulting increase in foreclosures across the state, the Division was given new responsibilities and resources when Governor Patrick signed comprehensive mortgage legislation into law at the end of November. Specifically, the statute includes the following provisions:

- Improved oversight and monitoring of certain mortgage lenders.

Office of Consumer Affairs and Business Regulation - - Press Release

- Requiring loan originators to be licensed by the Division of Banks and providing a $3 million appropriation to the Division to implement portions of the law.
- Requiring a 90 day "Right to Cure" and that a notice of the Right to Cure be filed with the Division of Banks.
- Establishing a foreclosure database at the Division of Banks to include information on all preliminary Right to Cure or foreclosure filing notices and all final foreclosure sale information.
- Requiring that the holder of a mortgage notify the Division of Banks of the date of a foreclosure sale and the purchase price of the property.

Six states joined Massachusetts for today's launch of the NMLS: Idaho, Iowa, Kentucky, Nebraska, New York and Rhode Island. Additionally, 42 state agencies representing mortgage regulators in 40 states have indicated their intent to transition onto the system.

Information about gaining access to and setting up a record in the NMLS can be found on the Division of Banks' website at www.mass.gov/dob. The Nationwide Mortgage Licensing System may be found at http://www.stateregulatoryregistry.org/NMLS.

Regulatory Bulletin 5.3-101 Fair Lending Policy - Licensed Mortgage Lenders

By the Division of Banks

RELATED LINKS

Division of Banks

1. APPLICABILITY AND SCOPE

The purpose of this policy statement is to articulate the views of the Division of Banks ("Division") concerning discrimination in credit, the need for licensed mortgage lenders to aggressively detect and eliminate discrimination, to indicate what the Division expects of the licensed mortgage lenders it supervises, and to give guidance on how licensed mortgage lenders can meet these expectations. In addition, this policy statement will identify how the Division will assess a licensed mortgage lender's performance with regard to fair lending including but not limited to the requirements of the federal Equal Credit Opportunity Act, Home Disclosure Act, and the Massachusetts Predatory Home Loan Practices Act (M.G.L. c. 183C), as added by SECTION 6 of Chapter 268 of the Acts of 2004.

2. DISCRIMINATION IN CREDIT

The federal Equal Credit Opportunity Act ("ECOA") regulations (12 CFR 202 or "Regulation B") and G.L. c. 151B prohibit discrimination on the basis of race, color, religion, national origin, ethnic origin, sex, marital status, age, or because all or part of the applicant's income derives from a public assistance program. These regulations apply not only to mortgage lending, but also to every other type of credit. Chapter 151B of the Massachusetts General Laws further prohibits discrimination for mortgage applicants on the basis of sexual orientation or handicap.

3. NEED TO DETECT AND ELIMINATE DISCRIMINATION

Both the mortgage lender industry and the mortgage lenders' supervisory agencies are faced with the many challenges of discrimination. Overt discrimination is easily recognized and quickly condemned. Where it exists, discrimination today is far more likely to be in subtle forms, or even unintentional. This is an area in which the industry and the regulators must work together.

Bias and prejudice must not impact the decisions to grant credit in a sound and fair manner including the pricing of mortgage loans. Discrimination will not be eliminated without the complete support and assistance of a licensed mortgage lender's board, management and staff. The Division has developed examination procedures to enable its examiners to detect discrimination more effectively. The Division will work aggressively to detect discrimination and will bring suspected cases of discrimination to the attention of the appropriate law enforcement authority.

1. WHAT THE DIVISION EXPECTS
2. All licensed mortgage lenders are expected to incorporate fair lending as a goal in their loan policies. Licensed mortgage lenders must work proactively to eliminate any potentially discriminatory policies, practices or procedures.
3. The Division has developed specific criteria which licensed mortgage lenders may use to detect and eliminate discriminatory policies and practices. Each recommendation should be reviewed to determine how it can be tailored to fit an individual licensed mortgage lender. Specific recommendations should be adopted and implemented if not already in place. Licensed mortgage lenders are encouraged to be innovative in their implementation of the specific recommendations which follow.
4.
    1. STAFF TRAINING

Staff training is an important step in addressing discrimination. Training should naturally focus on compliance with fair lending laws and regulations. In addition, the programs should convey the board's and/or senior management's commitment to fair lending and to the elimination of potentially discriminatory policies and practices. Training programs should be held on a regular basis with all staff to ensure that employees are familiar with their responsibilities to treat everyone in a fair, uniform and non-discriminatory manner. The training programs should include topics such as diversity training to eliminate potential personal bias.

5. COMPENSATION

Licensed mortgage lenders should review their compensation structures for all employees to ensure they are

not designed in such a way as to encourage disparate treatment of loan applicants. This may include incentives which could result in discouraging loans of small dollar amounts, steering, or packing loans with additional products and closing costs.

6. **PRICING AND UNDERWRITING STANDARDS**

Licensed mortgage lenders should have a clear written policy which outlines the loan pricing process. This policy should detail the factors that can affect loan pricing, including but not limited to credit profile of the applicant, property type, loan-to-value ratios, debt-to-income ratios and any other factors considered by the lender in determining the interest rate, points and fees to be charged. Licensed mortgage lenders should establish internal control procedures to ensure that the determination of interest rates and points and fees charged is consistent with established policy. Licensed mortgage lenders should also ensure that all loan pricing decisions are well documented. Licensed mortgage lenders should review their loan pricing policy on a regular basis for continued appropriateness and relevance to the current lending environment.

In addition, Massachusetts General Laws (M.G.L). c. 183, s. 64 prohibits lenders from using underwriting standards which are "arbitrary or unsupported by a reasonable analysis of the lending risks associated with a residential mortgage transaction." Underwriting standards should be reviewed to determine whether they arbitrarily exclude prohibited basis groups from qualifying for a mortgage. Licensed mortgage lenders should also be aware that they must apply credit application assistance in a fair and consistent manner. This in no way implies that a lender should not use sound underwriting standards when considering a loan application. Underwriting practices should be clear and similar to industry standards.

Licensed mortgage lenders will be held responsible for any activity performed on their behalf by their employees or agents. Due diligence on employees and agents should be performed on a regular basis to ensure compliance with federal and state laws and regulations.

7. **MARKETING**

Every licensed mortgage lender is expected to regularly review its marketing strategy, which may include but is not limited to, call programs to agents, or solicitations via the telephone, mail, internet, facsimile or text messaging. A lender should be able to explain its targeted marketing strategies and marketing techniques, particularly in those instances where it appears that certain products are marketed to different geographic areas or segments of the population.

8. **SECOND REVIEW PRACTICES**

All mortgage lenders in Massachusetts are required to refer denied applicants to the Mortgage Review Boards (M.G.L. c. 167, s. 14A). These boards provide a second review process for denied applicants who believe that they were unfairly turned down. However, prior to the issuance of an adverse action notice, mortgage lenders should have an independent internal process to review the application to determine whether the mortgage lender's application procedures were followed fairly and consistently. In addition, denied applications should be compared with approved applications to determine whether or not compensating factors were applied fairly and consistently.

9. **INTERNAL CONTROL PROCEDURES**

Licensed mortgage lenders should have a comprehensive audit and oversight system in place to ensure that disparate treatment of applicants is not taking place in any aspect of the mortgage process.

As part of its internal control procedures, licensed mortgage lenders should implement complaint resolution systems to effectively document and promptly respond to complaints from consumers.

To further ensure that loan policies and procedures are not discriminatory as well as for quality control purposes, a licensed mortgage lender should consider self-testing or a comparable alternative to ensure compliance with fair lending regulations.

10. **ASSESSMENT OF FAIR LENDING IN THE EXAMINATION PROCESS**

The Division uses the examination process as means of detecting suspected discriminatory practices in mortgage lending. The Division has adopted this policy with regard to the review for compliance with fair lending regulations pursuant to M.G.L. c. 255E, Section 8.

The Division will review a licensed mortgage lender's compliance with fair lending laws and regulations as part of its examination process. The Division will examine each lender for compliance with the federal Equal Credit Opportunity Act, Fair Housing Act, Home Mortgage Disclosure Act, M.G.L. c. 151B, and the Massachusetts Predatory Home Loan Practices Act during its regularly scheduled examinations/inspections for compliance with consumer protection laws and regulations. The Division may also conduct targeted examinations for compliance with applicable fair lending laws and regulations. The areas which the Division

will examine for discrimination include, but are not limited to the following: marketing techniques; loan pricing, the types and terms of credit available; staff compensation; pre-application policies and procedures; the soundness of underwriting standards and the consistency of their implementation; interviewing techniques; third party involvement (e.g. brokers, lawyers and appraisers) and notification practices. Not only will the Division review all aspects of the credit process for evidence of discrimination, but it is also expected that licensed mortgage lenders will review them as well.

11. **FAIR LENDING ENFORCEMENT POLICY**

All cases of suspected discrimination will be referred to the appropriate law enforcement agency.

12. **AUTHORITY**

G.L. c. 255E, Section 8

Information for Tenants

The Official Website of the Office of Consumer Affairs & Business Regulation (OCABR)

Mass.Gov

Consumer Affairs and Business Regulation

Home > Consumer > Housing Information > Foreclosure Resources >

Information for Tenants

Many lenders try to evict all tenants from a property immediately after a foreclosure sale, even if the tenants have paid their rent on time and have not violated any terms of their lease.

Governor Patrick and the Legislature have ensured that a tenant's lease will no longer be terminated by a foreclosure sale. According to a new state law (Chapter 258 of the Acts of 2010), tenants who live in a property that is foreclosed on are entitled to at least 30 days written notice if a lender wants them to vacate their apartment,. and they cannot be evicted except for "just cause." "Just cause" means any one or more of the following: the tenant has failed to pay the rent; has materially violated the terms of the tenancy; is committing a nuisance or is causing damage in the unit; is interfering with the rights of other tenants to enjoy the use of their units; or is permitting the unit to be used for illegal purposes. A tenant may also be evicted if he or she has refused to enter into a written extension or renewal of a lease or rental agreement which has terminated, or if the tenant refuses reasonable access to the rental unit for repairs or for showing the unit for re-rental, or upon a re-sale of the property to a third party.

If a tenant receives state or federal rental subsidy, the terms of their rental agreement will not be affected by a foreclosure sale.

Tenants who do not want to leave their apartments, after a lender gives proper notice, do not have to leave immediately. They have a right to a hearing in court. At the hearing, the court will determine how much time they will be allowed to vacate their apartment. Lenders may not force tenants to vacate an apartment against their wishes without court approval.

Tenant's Rights Brochure

The Tenant's Rights guide provides renters with information to ensure that they understand the foreclosure process and are not unfairly evicted if the building they live in is foreclosed upon. For the Spanish, Portuguese, Haitian Creole and Chinese versions of this guide, please see the links below.

- Tenant's Rights: What Tenants in Foreclosed Properties Need to Know PDF
- Derechos Del Inquilino: Lo que inquilinos necesitan saber cuando sus propiedades son ejecutadas PDF
- Direitos Do Rendeiro: O que rendeiros em propriedades execucao de hipoteca necessitam saber PDF
- Dwa Lokate: Lokate ki nan pwopriyete y'ap sezi dwe konnen PDF
- Tenant's Rights: What Tenants in Foreclosed Properties Need to Know - Chinese PDF

Additional Resources for Tenants

- Boston College Legal Assistance Bureau
- Greater Boston Legal Services: 1-800-323-3205
- Harvard Legal Aid
- Legal Assistance Corporation of Central Massachusetts: 508-752-3718
- Legal Services Center
- Massachusetts Justice Project
  - Holyoke: 413-533-2660
  - Worcester: 508-831-9888
- Merrimack Valley Legal Services: 1-800-336-2262
- Neighborhood Legal Services
- Western Massachusetts Legal Services
  - Greenfield 413-774-3747
  - Northampton: 413-584-4034
  - Pittsfield: 413-499-1950
  - Springfield: 413-781-7814

940 CMR 25.00: Foreclosure Rescue Transactions and Foreclosure-Related Services

25.01: Definitions

"Foreclosure Rescue Transaction" shall mean a transaction (a) by which residential property is conveyed where the person conveying the property (hereafter "homeowner") maintains a legal or equitable interest in the property conveyed, including, without limitation, a lease interest, an option to acquire the property, or other interest in the property conveyed; and (b) that is designed or intended by the parties to avoid or delay actual or anticipated foreclosure proceedings against a homeowner's residential property.

"Foreclosure-Related Services" shall mean any goods or services related to, or promising assistance in connection with: (a) avoiding or delaying actual or anticipated foreclosure proceedings concerning residential property; or (b) curing or otherwise addressing a default or failure to timely pay, with respect to a residential mortgage loan obligation. Foreclosure-Related Services shall include the offer, arrangement or placement of a residential mortgage loan, or other loan, when those goods or services are advertised, offered or promoted in the context described in (a) and/or (b) immediately above.

25.02 Prohibition on Foreclosure Rescue Transactions and Advance Fees for Foreclosure- Related Services

(a) It is an unfair or deceptive act in violation of M.G.L. c. 93A, § 2(a) to, for compensation or gain or for potential or contingent compensation or gain, whether at the time of the transaction or in the future, engage in, arrange, offer, promote, promise, solicit participation in, or carry out a Foreclosure Rescue Transaction in the Commonwealth or concerning residential property in the Commonwealth. Nothing in this subparagraph (a) shall be interpreted to prohibit Foreclosure Rescue Transactions that are not carried out for compensation or gain or for potential or contingent compensation or gain, including, by way of example, such transactions engaged in between or among family members or arranged by a non-profit community or non-profit housing organization.

(b) It is an unfair or deceptive act in violation of M.G.L. c. 93A, § 2(a) to solicit, arrange, or accept an advance fee in connection with offering, arranging or providing Foreclosure-Related Services; provided, however, that this subsection shall not prohibit alicensed attorney from soliciting, arranging or accepting an advance fee or retainer for legal services in connection with (i) the preparation and filing of a bankruptcy petition, or (ii) court proceedings, to avoid a foreclosure. Provided further, however, that a licensed attorney accepting an advance fee or legal retainer must comply with all applicable laws and regulations pertaining to such fees, including the Massachusetts Rules of Professional Conduct, specifically Rules 1.5 and 1.16. For purposes of this section, an advance fee is any money or consideration paid in advance of actually receiving services. If the Foreclosure-Related Services at issue concern the offer, arrangement or placement of a residential mortgage loan by a licensed mortgage broker or licensed mortgage lender, then this section (b) shall not prohibit the solicitation, payment or acceptance of a loan application fee provided that the fee conforms with all applicable laws and regulations, including any rules or regulations of the Commissioner of Banks.

25.03 Marketing of Foreclosure-Related Services

It is an unfair or deceptive act in violation of M.G.L. c. 93A, § 2(a):

(a) to advertise, offer or promote the availability of Foreclosure Rescue Transactions or services related to Foreclosure Rescue Transactions;

(b) to advertise, offer or promote Foreclosure-Related Services if the person so promoting intends to provide Foreclosure-Related Services by offering, engaging in, arranging, promoting, promising, or soliciting participation in, a Foreclosure Rescue Transaction;

(c) to advertise, offer or promote Foreclosure-Related Services without disclosing, clearly and conspicuously, (i) the precise goods and/or services offered and to be provided by the promoter of Foreclosure-Related Services, and (ii) a precise description of how the promoter will assist persons in avoiding or delaying foreclosure or curing or otherwise addressing a default or failure to timely pay a residential mortgage loan obligation.

(d) for a licensed mortgage broker or licensed mortgage lender to advertise, offer or promote Foreclosure-Related Services, where the goods or services promoted concern the offer, arrangement or placement of a residential mortgage loan (*i.e.*, replacement financing), without complying with all laws and regulations that

apply to the marketing of mortgage loans, including, without limitation, the regulations of the Commissioner of Banks (209 CMR 32.00 et seq.) and the Office of the Attorney General (940 CMR 8.00 et seq.).

NOT HAVING ONE'S CAKE AND HOPING FOR SOMETHING TO EAT
CAN CHAPTER 13 STRIP OFF A JUNIOR LIEN WITHOUT A DISCHARGE?

ABI MID-WINTER CONFERENCE
JANUARY 17, 2011
BOSTON

Peter C. Fessenden, Esq.
Standing Chapter 13 Trustee – District of Maine

Before October 18, 2005, filing for "Chapter 20" was a common bankruptcy strategy. With few restrictions on a Chapter 13 discharge under 11 U.S.C. §1328 [all further section references are to the Bankruptcy Code – Title 11 of the United States Code – unless otherwise stated], debtors would first file for Chapter 7, wipe out all obligations dischargeable under that chapter, and then invoke the greater powers of Chapter 13 for additional relief. *Cf.,* generally, *Johnson v. Home State Bank*, 501 U. S. 78, 111 S.Ct. 2150, 2156, 115 L.Ed.2d 66 (1991) ("Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously has filed for Chapter 7 relief"). It was used sparingly and ethically for the most part, and without much controversy.

The 2005 amendments changed the major premise of the Chapter 20 technique. A Chapter 13 discharge is no longer available to an individual who obtained a Chapter 7 discharge within the time limitations of §1328(f). Section 1328(f) now reads, in relevant part:

> (f) [T]he court shall not grant a discharge of all debts provided for in the [Chapter 13] plan or disallowed under section 502, if the debtor has received a discharge –

> (1) in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter, or
> (2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.

The brief debate over the interval between Chapter 13 cases was resolved in the debtors' favor in the First Circuit by the BAP. *In re Gagne*, 394 B.R. 219 (1st Cir. BAP, 2008) (the time between Chapter 13 cases is from filing to filing, not discharge to filing). The difference between the dates of filing and the issuance of the discharge in the Chapter 7 case may be critical in the individual case, but is not the focus of this discussion.

Chapter 20 remains alive and well for a debtor who is not pressed for time. However, the current dire state of the New England housing market – even as the overall economy slowly improves – has prompted debtors' counsel to pursue claim-splitting and stripoff in a Chapter 13 case in the absence of a discharge under §1328(a) or §1328(b): May a debtor strip off (or strip down) a lien against his or her property in a Chapter 13 case without seeking or obtaining a discharge at the conclusion of the case?

This issue is the subject of a recent insightful editorial by Judge Keith M. Lundin and former Judge William H. Brown that appears at www.Ch13online.com in connection with Lundin & Brown, CHAPTER 13 BANKRUPTCY, 4th Edition, www.Ch13online.com. They note – albeit critically – that the majority of cases hold that a second mortgage may not be avoided in the without a concomitant Chapter 13 discharge. The focus of the Lundin/Brown editorial is on the provisions of §1325(a)(5)(B)(i)(I) and §1325(a)(5)(B)(i)(II).

The several cases reviewed by Lundin and Brown take *Dewsnup v. Timm*, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992), as their starting point. *Dewsnup* held that a Chapter 7 debtor may not invoke §506 to bifurcate a secured claim or to strip a

wholly unsecured junior interest. "[A]llowing a debtor to file Chapter 7, discharge all dischargeable debts and then immediately file Chapter 13 to strip off a second mortgage lien would not be much different than simply avoiding the mortgage lien in the Chapter 7 itself. But Chapter 7 debtors are not allowed to use §506 to avoid liens." *In re Blosser*, 2009 WL 1064455 at *1 (Bankr. E.D.Wisc., April 15, 2009).

In *In re Fenn*, 428 B.R. 494 (Bankr. N.D.Ill., 2010), Judge Cox agreed with the objecting creditor that §1325(a)(5)(B)(1)(I) does not permit the confirmation of a plan in the face of opposition if it fails to retain a wholly unsecured lien until payment of the debt or discharge. In relevant part, the section reads:

> (a) ... [T]he court shall confirm a plan if –
> ...
> (5) with respect to each allowed secured claim provided for by the plan –
> ...
> (B)(i) the plan provides that –
> (I) the holder of such claim retain the lien securing such claim until the earlier of-
> (aa) the payment of the underlying debt determined under nonbankruptcy law; or
> (bb) discharge under section 1328...

In *In re Tran*, 431 B.R. 230 (Bankr. N.D.Cal., 2010), Judge Jellen noted that the same result is required by §1325(a)(5)(B)(i)(II) when a Chapter 13 case is converted or dismissed. That subsection provides:

> (a) ... [T]he court shall confirm a plan if –
> ...
> (5) with respect to each allowed secured claim provided for by the plan –
> ...
> (B)(i) the plan provides that –
> ...
> (II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law...

Lundin and Brown note accurately that there is nothing in the Bankruptcy Code that prohibits a debtor ineligible for a Chapter 13 discharge from stripping a wholly unsecured lien upon plan completion. They take congressional silence as permission. Although the absence of such prohibition was acknowledged in *Tran*, Judge Jellen found that lien-stripping through Chapter 20 contrary to the policy of *Dewsnup* was bad faith such as to justify denial of confirmation.

The strongest argument in favor of permitting lien-stripping in a Chapter 20 case without a discharge is based not on the differences between §1325(a)(5)(B)(i)(I) and §1325(a)(5)(B)(i)(II) but on the text of §1325(a)(5) itself. A putative secured claim wholly unsupported by any value cannot be a "secured claim" – let alone an "allowed secured claim" – under *Nobelman v. American Savings Bank*, 508 U.S. 324, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993). Therefore, the predicate to the sub-subsections does not apply, and the "allowed if not prohibited" argument is enhanced. Judge Cox noted the *Nobelman* distinction in *Fenn* but, according to Lundin and Brown, wholly misunderstood it.

Assuming that the good faith/bad faith determination becomes the real measuring stick of Chapter 20 lienstripping, the editorial asks, "What kind of proof will it take to convince a court that the debtor receiving a Chapter 7 discharge yesterday has a good reason for filing Chapter 13 today?" Ideally, Chapter 20 should be available to a debtor who files for Chapter 7 with the ability and intention to pay his or her obligations secured against property the debtor wishes to retain, but who thereafter experiences an unexpected change in circumstance, similar to that necessary for a plan amendment. If, after receiving the Chapter 7 discharge, the debtor suffers unanticipated further

financial decline that makes it impossible to pay the junior mortgage(s), Chapter 13 should be available to permit the debtor to keep the collateral by stripping off the junior liens

The question is whether Chapter 20 will become the Shangri-La of the disingenuous. Bankruptcy courts should be wary of debtors' parroting only the mantra of a "change in circumstance." Debtors should be able to present facts that establish both the unanticipated arrival of new circumstances and their actual severity. Strategic bankruptcy planning at the time of filing has become commonplace when trying to avoid the impact of §707(b) or §1325(b) in determining choice of chapter or the duration of a Chapter 13 plan. It remains to be seen if similar planning will be accepted when pursuing Chapter 20 relief.

With or without a concomitant Chapter 13 discharge, there is disagreement among courts and practitioners on the procedure necessary to strip down or strip off an undersecured or wholly unsecured security interest. Is it necessary to file an adversary proceeding, or may a wholly unsecured lien be partially or fully avoided solely by including an appropriate provision in a properly noticed Chapter 13 plan?

The overwhelming majority of published opinion holds that an adversary proceeding is required. However, an informal survey of local practice across the nation indicates that actual practice is overwhelmingly tilted in favor of lienstripping by plan provision alone. In addition, there is sound support for proceeding by plan provision in the Federal Rules of Bankruptcy Procedure.

Most courts addressing the issue adopt the reasoning of *In re Ginther*, 427 B.R. 450 (Bankr. N.D. Ill., 2010). The syllogism is straightforward: Fed.R.Bankr.P. 7001(2) requires an adversary proceeding in any action "to determine the validity, priority, or

extent of a lien or other interest in property." Stripping a wholly unsecured junior lien against a debtor's property is an action to determine either the validity or extent of that lien. Therefore, an adversary proceeding is required.

Ginther acknowledged the recent Supreme Court ruling in *United Student Aid Funds, Inc. v. Espinosa*, ___ U.S. ___, 130 S.Ct. 1367, 176 L.Ed.2d 158 (2010), which held that a creditor can affirmatively waive its right to an adversary proceeding, or may lose its right by failing to object where it received sufficient notice of the relief being sought by the debtor. Where, as in *Ginther*, the creditor insisted on strict adherence to Fed.R.Bankr.P. 7001(2), an adversary proceeding would be required. (Contra, *In re King*, 290 B.R. 641 (Bankr. C.D.Ill., 2003).)

As noted, general practice in New England and across the country recognizes that no substantive advantage is derived from requiring an adversary proceeding. Most districts accept properly-phrased plan provisions as an economical, efficient and practical way to address the issue.

Even so, there is sound support in Rule 7001 for a streamlined procedure. Fed.R.Bankr.P. 7001(7) requires an adversary proceeding "to obtain an injunction or other equitable relief, *except when a ... plan provides for the relief*." (Emphasis added.) Since the stripoff is effected through the permanent discharge injunction set forth in §524(a), there is no more reason to require an adversary proceeding for that purpose than there is to require one to prohibit a creditor from pursuing the debtor or the debtor's property for any other pre-petition claim provided for in the plan.

SEEKING AND ATTAINING MODIFICATIONS OF LOANS IN CHAPTER 13 PRACTICE

BY: John F. Sommerstein

Typically, when initiating a modification with a Bank, an authorization allowing the Bank to talk to the attorney will need to be transmitted. Follow up. There have been countless times that the Bank claims not to receive the authorization. Also, if the Bank is represented by counsel, send a copy to counsel for the Bank. Scan and save the emails and faxes. They help in establishing that authorizations and notices have been sent Any delay in the process can forestall the modification by months. Expect that there will be delays. My motto: Be stoic but vigilant.

Become aware of the HAMP directives which can be found at:

https://www.hmpadmin.com/portal/programs/guidance.jsp

The typical modification application, if one exists, is comprehensive. If the debtor is sophisticated, consider allowing him or her to try to accomplish it on his or her own. It takes you, the middleman, out of the equation, at least temporarily. If not, consider a non-profit agency such as NACA. The debtor will need to provide a lot of financial information. Review it to ensure that it comports with Schedules I and J.

If you are involved throughout the application process, expect delays and more delays. Expect that you will be on hold with a customer representative who will tell you he or she does not have the documents that you know you've emailed or faxed. This is the nature of the beast.

Sometimes the debtor will be approved on a preliminary basis, often called a trial period.

Beware of false trial periods where deadlines such as first payment may have expired before the document is even received. Also, beware of escalations in the modification for technical or minute violations of trial periods.

Beware of the difficulty in establishing verifiable income when dealing with a self-employed debtor. The debtor must sign an IRS 4506-T form allowing the lender to verify income by looking at prior tax returns.

Focus on payments (including escrow payments) that are below 31% of the household's gross income accounting for 75% of the rental income. Often, the lender wants to see bank statements or lease for verification purposes.

Ensure that the modification is in the best interests of the debtor. Just because the monthly payment is reduced does not necessarily mean the terms are better. Many proposed investor loans call for a balloon payment which is potentially disadvantageous to the long-term well being of the debtor.

Look for a HAMP loan which is capped at 4 or 5% for the entire principal balance and starts off at 2%. HAMP program also allows stretch out for 40-year loan modifications. These can be the best or at least most affordable loan modifications.

When filing a Motion to Approve Loan Modification, attach a copy of proposed modification including all terms.

Include a statement in your Motion that amended schedules I and J will be filed with the amended plan following the modification. This simple step will obviate the need for the Trustee to file a Response.

Be prepared to file an Amended Plan as a modification typically materially changes a plan. If the plan has not been confirmed, the standard Chapter 13 plan will be

sufficient. See Official Local Form 3. If the modification is post confirmation, make sure to use Official Local Form 3A.

If the bank's claim that is subject to the modification is listed in the plan as being paid through the Trustee (i.e. pre petition arrears), include a statement that the Trustee will be paid her commission on the balance of that claim. This can be incorporated into an amended plan.

Do not be surprised if Loss Mitigation department is not in sync with Bankruptcy Department. If the debtor is awaiting a modification and has not made full contractual payments, you may hear from BK Department or Bank's counsel that a Motion for Relief is being prepared. However, most banks are aware of HAMP Supplement Directive prohibiting foreclosure while loan modification application is pending.

Sometimes, post modification, it is prudent for the debtor to convert the case to Chapter 7, especially when all other debt is clearly dischargeable and the debtor is below median income.

Remember that when filing an amended plan, it is essential to amend Schedules J as well as the payment will necessarily vary from the pre modification amount. However, that change in circumstance may be offset by other changes. In other words, redo the budget.

There is no need to request authorization from the Trustee to modify the loan. Only the Court can give authorization and the debtor must file a motion in order to obtain court authorization.

Do not assume that because the motion was filed and no responses filed that the Court will grant the motion. Judges often have questions related to the interest rate and or other issues, and may hold a hearing.

After allowance of the Motion, again, follow up with the lender. This is where it is especially advantageous if counsel represents the Bank.

The lender will be responsible for recording any modification at the appropriate Registry of Deeds. Be prepared to confer with lender's counsel to ensure this gets accomplished.

Good Faith in Chapter 13: Making Sure the Court Sees It

By William J. McLeod
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Good faith in chapter 13 is already covered in *Chapter 13 in 13 Chapters* (which is referred to here as "the book"), so I do not repeat that here.[1] This article does not address the concept of good faith, but some interesting issues that have arisen in the past year. When I started thinking about this article, I was sitting in my office contemplating where I was going to begin and my eyes fell upon a large framed poster in my office of Robert Mapplethorpe's *Calla Lily*.

It was the first pieces of "art" that I hung in my office twenty years ago while a young associate in Hartford, Connecticut. I was admittedly aware of the stir caused by much of Mapplethorpe's work, as that time the museum and gallery showings of his work across the nation were typically accompanied by protest. But as an amateur photographer, I found the portrait to be strikingly simplistic of a flower that is anything but. Of course, that did stop a Neanderthal from remarking – several times – that he felt that it was more phallic than flora, nor suggesting that it should be removed lest it offend potential clients or then current employees. The artwork remains on the wall. All of this reminded me of this case I read way back in law school.

A Relevant Detour: *Jacobellis v. State of Ohio*[2]

Nico Jacobellis was a manager of a movie in Ohio and he was convicted on two counts of possessing and exhibiting an obscene film in violation of Ohio law.[3] His case

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[1] See p. 68, et seq.

[2] 378 U.S. 184, 84 S.Ct. 1676 (1964).

[3] It was a French film entitled *Les Amants* or *The Lovers*. The Court wrote that the movie involved

> A woman bored with her life and marriage who abandons her husband and family for a young archaeologist with whom she has suddenly fallen in love. There is an explicit love scene in the last reel of the film, and the State's objections are based almost entirely upon that scene. The film was favorably reviewed in a number of national publications, although disparaged in others, and was rated by at least two critics of national stature among the best films of the year in which it was

traveled all the way up to the US Supreme Court on First and Fourteenth Amendment grounds. Writing for the majority, Justice Brennen discussed the obsenity test set forth in *Roth v. U.S.*: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 345 U.S. 476, 489, 77 S.Ct. 1304, 1311 (1957). The analysis turned to the term "contemporary community standards."

Justice Brennan observed that the concept of "contemporary community standards" was first expressed back in 1913 by Judge Learned Hand who wrote:

> 'Yet, if the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think that they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its memberships. If there be no abstract definition, such as I have suggested, should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? * * * To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.
>
> 'Nor is it an objection, I think, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent. * * *' (Italics added.)
>
> *Jacobellis v. State of Ohio,* 378 U.S. at 192-193, 84 S.Ct. at 1680-1681, [citing *United States v. Kennerley*, 209 F. 119, 121 (D.C.S.D.N.Y.1913)].

The majority found that the movie was not obscene and reversed the convictions. In a short concurring opinion, Justice Stewart provided this memorable quote:

> It is possible to read the Court's opinion in *Roth v. United States* and *Alberts v. California*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, in a variety of ways. In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be

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produced. It was shown in approximately 100 of the larger cities in the United States, including Columbus and Toledo, Ohio.

> indefinable. I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since Roth and Alberts, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it*, and the motion picture involved in this case is not that.
>
> *Jacobellis v. Ohio*, 378 U.S. at 197 (emphasis added)(footnotes and additional citations omitted).

The majority viewed the film and judged it for themselves.

Now to Bring it Home: Good Faith in Chapter 13

While Mr. Jacobellis was successful before the US Supreme Court, at least three justices dissented. It's far beyond the scope of this article – or this conference - to determine whether the three Justices who disagreed with the majority opinion based on the legal principles and philosophy or whether they found *Les Amants* to be obscene. But Justice Stewart's observation that he knows hard-core pornography when he sees it is particularly astute. And remembering that observation might be very helpful in litigating the issue of a chapter 13 debtor's good faith.

As I discuss in the book, the code does not define "good faith." However, case law does identify a number of criteria that courts may consider when evaluating a chapter 13 debtor's good faith in both filing the chapter 13 case, and in proposing and seeking confirmation of the chapter 13 plan. That criteria includes, but is in no way limited to the list appearing on p. 69 of the book.

The Bankruptcy Court's determination of good faith is within its discretion. Thus, it's not really out of the realm of the possible that a Bankruptcy Court might find good faith when it sees it.

"I know it when I see it"

At the risk of repeating the book, the burden in establishing good faith rests with the debtor. When a question of the debtor's bad faith might arise, practitioners should be prepared to defend the issue of the debtor's good faith at the earliest opportunity: the §

341 meeting, if not sooner. But how? As we see with these case examples, the best – if not the only way – for the Court to assess the debtor's good faith, or lack of bad faith, is with facts.

-The Disguised Chapter 7

If the chapter 13 plan proposes to pay only the debtor's counsel's fee as an administrative expense along with the chapter 13 trustee's commission, is this good faith? A recent Massachusetts Bankruptcy Court decision denied confirmation, finding that the disguised chapter 7 was not proposed in good faith. *In re Buck*, 432 B.R. 13 (Bankr. D. Mass. 2010).

The Chapter 13 Trustee objected to confirmation of the plan which paid only debtor's counsel citing that from "'an economic and legal standpoint, it does not appear to be in the Debtors' best interest to be in Chapter 13;' that 'based on the Chapter 13 Agreement filed in both of these cases, [Debtor's counsel] concluded 'Chapter 7 is appropriate' and that fees and costs would be $2,554.00;' and '[i]t appears the only benefit for the Debtors to be in Chapter 13 is that legal fees could be spread over 36 months, however, the fees are increased to $4,000 per case.'" *Id.,* 432 B.R. at 18.

At the hearing on the objection to confirmation, the Court ordered debtor's counsel to file fee applications. The Chapter 13 Trustee indicated that she would file and did file motions to dismiss or convert to chapter 7. These motions were mooted by the debtors' voluntary conversion to chapter 7, leaving only the issue of debtors' counsel's fee application before the court. *Id.* This caused a bit of a procedural quagmire.

In support of the fee application, debtor's counsel submitted affidavits from 14 former clients who attested that they were "satisfied with their decisions to pay their attorneys' fees through a Chapter 13 plan even though the fees are higher-because that route afforded them immediate relief that they could not have attained under Chapter 7." *Id.,* 432 at 18-19. In companion cases, debtor's counsel submitted the affidavit of another "local attorney [who] sought to lend support to the argument that many potential Chapter 7 debtors are unable to seek protection in Chapter 7, despite great financial distress, because they are unable to afford Chapter 7 attorneys' fees." *Id.*

With regard to the affidavits from the former clients, the Court noted

> [N]o facts are in dispute and no evidence was taken or requested to be taken by any party, the role and necessity of the affidavits is not clear. Further, their credibility is questionable at best, given that each is submitted by a person counseled by [debtor's counsel] and each contains virtually identical language and structure. The Court is comfortable inferring that they were not drafted by the debtors.
>
> *Id.*, 432 at 19, fn 8.

The affidavit from the local attorney was met with a motion to strike by the Chapter 13 Trustee.

> In that motion, she argued that [the local attorney] does not have any personal knowledge of the facts in any of the cases under advisement and that the … Affidavit "convolute[s] the issues." This Court took the Chapter 13 trustee's Motion to Strike under advisement and agrees that the … Affidavit is inappropriate. As no evidence was taken and no facts are in dispute, the …Affidavit's proper form, if any, would have been as an amicus brief. In light of the fact that the Chapter 13 trustee had no opportunity to examine [the local attorney] and that the affidavit may not have been admissible on relevance and personal knowledge grounds, even in an evidentiary context, this Court will grant the Chapter 13 trustee's Motion to Strike Affidavit in the [companion] cases.
>
> *Id.,* 432 at 19, fn 9.

Hence, the quagmire.

Without any evidence for the Court to consider, the issue then turned on the reasonableness and necessity of the services rendered. Firstly, Judge Henry Boroff noted a "majority of courts" that had found that attorney-fee-only/disguised chapter 7s indicated bad faith. He also took umbrage with the notion the plans proposed were mechanisms by which counsel could collect their fee. *Id.*, 432 at 21, fn 14. Additionally, as Judge Michael Deasy also observed in *In re Dicey*, 312 B.R. 456, 459-460 (Bankr. D. N. H. 2004), "Congress did not create Chapter 13 as a vehicle solely for the payment of attorney's fees."[4]

[4] In *Dicey*, the debtor filed chapter 13 after getting slapped with a civil judgment for a debt that would be dischargeable in chapter 13, but not in chapter 7. The debtor's plan proposed 36 monthly payments of $125, with a virtual 0% dividend to unsecured creditors. The debtor's unsecured debt was approximately $68,000, of which $40,000 was the civil judgment. In denying confirmation, he stated:

The debtors' stations did not assist the contention that the fee-only plans were filed in good faith. As Judge Boroff observed:

> Both of the Debtors were ideal Chapter 7 candidates, having no previous filings, no valuable assets that could be property of the estate, and incomes well-below the state median. Indeed, within a short time after conversion of these cases to Chapter 7, the Chapter 7 trustee reported no assets available for distribution to unsecured creditors, and each Debtor eventually received her Chapter 7 discharge. But these debtors could have received their Chapter 7 discharges by early 2009. Instead, they did not receive their discharges until October 29, 2009 (Buck) and November 3, 2009 (Groccia). Each of these debtors, if properly counseled, could have filed Chapter 7 bankruptcy cases in November of 2008, either [by debtors' counsel] employing a reduced rate, by another attorney with a lesser charge, by a legal services organization, or *pro se.*
>
> *Id*., 432 at 24.

Does this mean that all chapter 13 debtor's who propose to pay only their attorneys fees risk denial of confirmation and even dismissal based on a lack of good faith? The short answer is "no," with the caveat that the answer is based on the unique factual circumstances that lead each debtor to the steps of the bankruptcy court. But these factual circumstances cannot get before the court without admissible evidence.

Moreover, both of these cases address good faith in the initial plan, not in a post filing or post confirmation modification which seeks to include the debtor's counsel's fees for reasonable and necessary services rendered in the chapter 13 case. Does this decision mean that chapter 13 counsel is forced to defend without compensation a long, protracted and contentious objection to confirmation, motion to dismiss or claim dispute (or a combination of any of these)? Again, the short answer is "no", but with the caveat that the answer is based on the unique facts and circumstances of the case and the reasonableness and necessity of debtor's counsel's fees.

> The de minimis dividend, the fact that the debt would be nondischargeable under a Chapter 7, the fact that the case is in substance a one creditor case, the fact that no prepetition creditors are receiving any substantial payment, the fact that the only distributions will be to administrative creditors and the timing of the bankruptcy filing, all lead to the conclusion that the plan was not filed in good faith.
>
> *In re Dicey*, 312 B.R. at 460.

-The Non-Debtor Spouse: What's Missing from this picture?

The Massachusetts Bankruptcy Court also looked at the debtor's good faith in the case of *In re Waechter*, 439 B.R. 253 (Bkrtcy.D.Mass. 2010).[5] The debtor proposed a plan without including the non-debtor spouse's income. That was permissible in light of the unique facts of the case, namely, the terms of the debtor's premarital agreement. However, Judge Melvin Hoffman nevertheless found that the debtor's plan was not filed in good faith ruling that "the Debtor may not rely on the premarital agreement as justification for taking full responsibility for paying household expenses, effectively subsidizing her husband's income at the expense of her creditors."

What was missing from the case? Any facts suggesting that the premarital agreement addressed how the spouses were to "divide the joint day-to-day expenses of their married life." *Id.,* at 257. And since it appears that there were no facts presented indicating how those expenses were to be divided, the court denied confirmation on the totality of the circumstances. *Id.*

-Adult kids

In this increasingly challenging economy, debtors are finding the need to support adult children who may, or who may not, be residing with the debtor. Does it arise to bad faith if a debtor provides for support of adult children (who are not dependants)? Without facts, debtors might find the answer to be "yes."

In *In re Lofty*, 437 B.R. 578 (Bankr. S. D. Ohio 2010) the debtors proposed a plan that was riddled with issues, among them, their paying for the housing of their adult son and grandson (in addition to paying their own housing expenses). They maintained that they had a "moral obligation" to take care of their adult son and grandson, who were residing in property that was owned by, and the debt and maintenance payments were made by the debtors.

[5] The Court also looked at the issue of projected disposable income and the Chapter 13 Trustee's contention that the plan did not properly include the non-filing spouse's income. This article addresses the good faith issues only. The projected disposable income issue is discussed in the materials authored by Carolyn Bankowski, Chapter 13 Trustee for the Eastern District of Massachusetts.

In denying confirmation, US Bankruptcy Judge Guy Humphrey wrote that by opting to pay the expenses of the adult son and grandson, "the [d]ebtors are choosing to support family members at the expense of their nonpriority creditors."

Evident from the court's opinion is the lack of factual and admissible evidence that supported any of the debtors' justifications for supporting their adult son and grandson. For example,

> The Debtors' Brief states that "[r]etaining the Lakeshore Property provides stability to the Debtors' son and grandson who have been renting and living there for many years." *The record does not provide sufficient evidence to support this broad assertion.* As Judge Mullins aptly recognized in *In re Johnson,* 318 B.R. 907, 919 (Bankr.N.D.Ga.2005), a court cannot embark upon the path of determining "where the Debtor should live[,] ... the Debtor's ability to obtain other housing, the availability of housing in a particular area, the Debtor's desire to remain in a certain school district, the type of housing available, the safety of the Debtor's neighborhood, the details of the Debtor's commute to work, [or] the Debtor's sentimental ties to the home[.]" *However, the court can make determinations of good faith based upon objective criteria and evidence*.
>
> *In re Lofty*, 437 B.R. at 590, fn 8. (emphasis added).

The Take Away

As I discuss in chapter 9 of the book, certain issues in chapter 13 require litigation, and this includes "good faith." While practitioners might know their client's situation, and might know what lead them to seek bankruptcy protection, that knowledge – and even the client's testimony - may not be enough to establish good faith in response to good faith objections. Witnesses may be required. Experts testimony may be required. Documents and other tangibles might need to be introduced into the record after a foundation has been properly laid. And these issues that might arise are not limited to adversary proceedings concerning exotic mortgages or interesting claim issues. In fact, some of the very issues needing to be litigated in chapter 13 is the debtor's very right to *be* a chapter 13 debtor.

In *Jacobellis*, the Justices viewed the movie and the majority determined that the obscenity charges were not justified based on what they saw and heard. Practitioners facing a challenge to good faith should consider assuming the role of film director: like a

director manages everything from lighting, film quality and script changes, chapter 13 practitioners need to carefully construct their cases with admissible evidence. And, like when the film is "in the can," practitioners must allow the evidence to "play out" in an evidentiary hearing.

A film director who insists on holding something back under the assumption that the audience should just know that he or she is thinking risks a film with plot holes and bad reviews.[6] Likewise, the Bankruptcy Court cannot consider what debtor's counsel does not properly forward. And without that perspective, the court may not see what the chapter 13 debtor desperately needs the court to see.

[6] David Lynch's "Lost Highway" is one that comes to mind.

Projected Disposable Income Update

Carolyn A. Bankowski
Chapter 13 Trustee
Eastern Division of Massachusetts

Mechanical Approach Survives Post Lanning?

In Lanning, the Supreme Court held "when a bankruptcy court calculates a debtor's projected disposable income, the court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation." In re Lanning, 177 L.Ed.2d 23, 34 (2010). In Coffin, the Bankruptcy Appellate Panel for the First Circuit (the "BAP") considered the effect of Lanning when determining whether an above median income Chapter 13 debtor may claim a deduction on the means test form for ownership expenses against a vehicle when the debtor has no lease or debt payments associated with the vehicle. See In re Coffin, 435 B.R. 780 (1st Cir. BAP 2010). eCast, a general unsecured creditor in the case, objected to confirmation of the debtor's Plan asserting that the debtor had understated his projected disposable income by deducting ownership expenses for vehicles that were neither leased nor encumbered.

The BAP held

> the statutory structure requires that the vehicle ownership expense be determined strictly based on the National Standards (rather than on the Debtor's actual expense). This difference in approach is dictated by the statute itself, namely that 1325(b)(3) mandates how expenses are to be calculated for above-median income debtors but not for below-median income debtors.

Id. at 786. The BAP determined that Lanning did not apply to the dispute because there had been no "change". The Court cited Dan press, Supreme Court decides *Hamilton v. Lanning*: Projected Disposable Income in Chapter 13 Bankruptcy is not Strictly Mechanical, Bankruptcy Law Network: Bankruptcy cases & Legislation, (June 7, 2010) (arguing that the Lanning decision "should not result in the IRS-allowed expenses being disregarded," because "a discrepancy between the expenses allowed on the 'means test' and the Debtor's actual expenses" is not a "change").

The BAP reasoned that section 707(b)(2)(A) and (B), the so-called "means test," significantly restricts court discretion as to those expenses which are "amounts reasonable necessary" and accordingly can be deducted in calculating disposable income. 11 U.S.C. sec. 1325(b)(3); 11 U.S.C. sec. 707(b)(2); (citations omitted). Pursuant to sec. 707(b)(2)(A)(ii)(I), the above median income debtor's monthly expenses are fixed as "the debtor's *applicable* monthly expense amounts specified under the National Standards and Local Standards, and the debtor's *actual* monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides." 11 U.S.C. sec. 707(b)(2)(A)(ii)(I). Id. at 788.

NOTE: The United States Supreme Court heard oral argument in October in the case of Ransom v. MBNA America Bank, NA, 577 F.3d 1026 (9th Cir. 2009, cert. granted, 13- S.Ct. 2097 (2010). Ransom also involved the issue as to whether a debtor could claim the vehicle ownership deduction when no lease or debt payments were owed.

Non-Filing Spouse's Income Subject To Bankruptcy Court Scrutiny?

Although a debtor's spouse may not join in the bankruptcy petition, the disclosure of the debtor's spouse's income is required in a number of places in the Schedules and Statements. For example, Schedule I was amended to make "clear that 'every' married debtor must provide income information for both spouses, unless the spouses are separated and a joint petition is not filed." *Collier Commercial Bankruptcy Forms* at §8.41. Official Form 6I directs that the "column labeled 'Spouse' must be completed in all cases filed by joint debtors and by every married debtor, whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed." Official Form 6I. The Statement of Current Monthly Income further requires that married debtors are to Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income) for lines 2-10. See for e.g., Official Form 22C.

The Bankruptcy Code further provides that in a case that is not a joint case, current monthly income of the debtor's spouse shall not be considered for purposes of filing a motion to dismiss for abuse if –

> (i)(I) the debtor and the debtor's spouse are separated under applicable nonbankruptcy law; or
>
> (II) the debtor and the debtor's spouse are living separate and apart, other than for the purpose of evading subparagraph (A); and
>
> (ii) the debtor files a statement under penalty of perjury -
>
> (I) specifying that the debtor meets the requirement of subclause (I) or (II) of clause (i); and
>
> (II) disclosing the aggregate, or best estimate of the aggregate, amount of any cash or money payments received from the debtor's spouse attributed to the debtor's current monthly income.

11 U.S.C. sec. 707(B)(i) and (ii).

In addition, when determining the applicable commitment period for a Chapter 13 Plan, the Bankruptcy Code requires that the current monthly income of the debtor and the debtor's spouse combined must be utilized. See 11 U.S.C. secs. 1322(d) and 1325(b)(4). The Code provisions concerning how to determine disposable income are different. The Bankruptcy Code provides that if the trustee of the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the Plan unless "the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period will be applied to make payments to unsecured creditors under the plan." 11 U.S.C. sec. 1325(b)(1)(B).

While there is no definition for projected disposable income in the Code, the term "disposable income" means current monthly income received by the debtor … less amounts reasonably necessary to be expended … for the maintenance or support of the debtor or a dependent of the debtor. 11 U.S.C. sec. 1325(b)(2). Section 1325(b)(2) does not include the language of "and the debtor's spouse" which is specifically included in the statutes previously cited. Further, the definition of "current monthly income" provides that it "includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents. See 101(10A)(B).

Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act, the majority of courts held that the court must consider the income of a non-debtor spouse in calculating the debtor's disposable income. In re Quarterman, 342 B.R. 647 (Bankr.M.D.Fla. 2006). In Quarterman, the court considered the amendments to section 1325(b) for determining "disposable income" and the definition of "current monthly income" and determined that "in a single case, a debtor's spouse's income shall be included in the debtor's current monthly income to the extent that it is paid 'on a regular basis for the household expenses of the debtor or the debtor's dependents.'" Id. at p. 651.

The Massachusetts Bankruptcy Court recently addressed the issue of what portion of a non-filing spouse's income needed to be devoted to a Chapter 13 debtor's unsecured creditors. In Waechter, on Schedule I, the debtor disclosed her non-filing spouse's gross income and payroll deductions. On Schedule J, the debtor excluded all but $38.57 of the spouse's net income with a line item described as "Spouse's prerogative, pursuant to premarital agreement, not to share income." See In re Waechter, 2010 Bankr.Lexis 3769 (Bankr.D.Mass. 2010). The debtor submitted as an exhibit to the court a premarital agreement that provided that each party would pay his or her own debts and neither party was to be held liable for the debts of the other. Id. As the debtor did not actually receive any income from her non-filing spouse, the court determined that the plan satisfied the requirements of 11 U.S.C. sec. 1325(b)(1)(B). However, the court determined that the inquiry did not end there, and that the debtor still needed to satisfy the separate good faith requirement set forth in 11 U.S.C. sec. 1325(a)(3). Id. After considering the totality of the circumstances in the case, the court determined that while it did not have authority to order the non-filing spouse to pay his share of the marital expenses, it could find that based on the totality of the circumstances, the debtor's plan, in which she proposed to pay a disproportionate amount of the couple's shared household expenses, was not proposed in good faith. Id.

The court further provided the following guidance:

> Where questions of good faith arise with respect to a non-filing spouse's contribution, or lack thereof, to a debtor's disposable income in Chapter 13 cases, some courts have investigated the lifestyle choices of the non-filing spouse. Thus, for example, if the debtor received income towards household expenses

> from her non-filing spouse while at the same time enjoying the benefits of excessive luxury household expenses paid for exclusively by the spouse, courts have denied plan confirmation on the basis of bad faith. See In re McNichols, 254 B.R. 422, 430 (Bankr.N.D.Ill. 2000). On the other hand, if it is clear that the non-filing spouse is using his surplus income substantially to pay his own obligations, and is not otherwise subsidizing the debtor's luxury lifestyle while the debtor's creditors take it on the chin, then courts will find the debtor's plan to be filed in good faith. See In re Nahat, 278 B.R. 108 (Bankr.N.D.Tex. 2002).

Waechter at p. 5.

Providing a breakdown on Schedule J and/or on the means test form (marital adjustment) of the non-filing spouse's necessary expenses would assist when the trustee or unsecured creditors are evaluating whether an objection to the plan would be proper. Expenses claimed for obligations that are necessary and for which the spouse is solely liable, i.e., spouse's credit card payments or child support payments, would not usually be met with an objection. However, a deduction for the spouse's independent expenses with no further explanation would usually be subject to an objection.